

It cannot have escaped anyone's notice that as of 5 November, England has entered into lockdown 2.0. The government's general guidance on what is/is not permitted until 2 December 2020, when the current lockdown is due to expire, can be accessed [here](#). The main message from the government in relation to work (from [section 6](#)), on the face of it, is fairly straightforward – "To help contain the virus, **everyone who can work effectively from home must do so**".

However, the Regulations implementing the new lockdown ([The Health Protection \(Coronavirus, Restrictions\) \(England\) \(No. 4\) Regulations 2020](#)) arguably contain a stricter test. It is now a criminal offence for anyone to leave their home without a "reasonable excuse", which will include where it is "reasonably necessary" for someone to be outside their home for work purposes because it is not "reasonably possible" for them to provide those services from their home.

Particularly in relation to desk-based jobs, while an employer might arguably be able to say that an individual cannot do their work effectively from home, it will be harder for it to argue that it is not "reasonably possible" to do so. Remember that "possible" is a different test from the more common wording of "practicable", and a higher hurdle to surmount. Of course, when the employer is considering what work to expect of any particular individual, there will be a variety of other factors which come into play, including whether the employer actually has any work for the individual to do, whether the individual is well enough to do it, or whether the individual is prevented from doing so due to childcare responsibilities, and so on.

Combine this with the hokey cokey (see [here](#)) of unlocking the lockdown and then locking it back up again, winding down the furlough scheme, pausing the shielding programme, introducing the job retention bonus and the job support scheme, swiftly followed by the modification and then almost immediate withdrawal of the same and the reintroduction of the furlough scheme initially for a month and then shortly afterwards for five months (more detail on that [here](#)) and the shielding programme, employers could easily be forgiven for losing track of what they can/cannot/should/should not be asking their employees to do in terms of coming into work or not. As employers, you are left with broadly the same messages as before, though now backed with potential criminal sanctions – if it is possible to do a halfway adequate job from home, employees should be encouraged to stay there. If it is possible to do most of their work from home, they should come in only for the parts where it is not. If they genuinely cannot do the job properly (which should be interpreted as falling some way short of perfectly), then you can ask them to come in and enforce that if really necessary, but be aware that if things go wrong, everyone will say it is your fault anyway. Therefore, your arguments as to necessity and the impossibility (as opposed to undesirability) of remote working had better be pretty polished.

To assist employers in navigating these issues and help them to understand their options, we have put together this quick guide.

Please note that this guide is intended as a high-level overview only and should not be regarded as a substitute for legal advice.

Click on the categories of employees (below) to see what your options are:

- **"Reasonably possible" to work from home**
- **Not "reasonably possible" to work from home**
- **Unwell due to COVID-19**
- **Self-isolating** – Lives with someone with COVID-19 symptoms or in a linked or extended household with symptoms
- **Self-isolating** – In accordance with a notification from NHS Test and Trace
- **Self-isolating** – Compulsory 14 day isolation after returning to the UK from abroad
- **Shielding**
- **Vulnerable**
- **Childcare responsibilities**
- **Scared of physically going into work**

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Category of Individual	Duration of Absence	Can/Should They Be Required to Physically Attend the Workplace?	Pay if the Individual Can Work From Home?	Pay if they Do Not Come to Work and Cannot Work From Home?	Can Furlough Them?	Suggest They Use Accrued Holiday to Cover Period of Absence?	Suggest They Take Unpaid Leave to Cover any Period of Absence?
“Reasonably possible” to work from home	N/a	X	✓ The individual will be entitled to their usual pay.	N/a	✓ The furlough scheme has now been extended to March 2021 (although the government has stated it will review the scope of the scheme in January). Subject to an individual satisfying the eligibility requirements, the individual could be furloughed if there is a business need to do so.	N/a	N/a
Not “reasonably possible” to work from home	N/a	✓ In particular, people who work in critical national infrastructure, construction, or manufacturing should continue to travel to their workplace. Public sector employees working in essential services, including childcare or education, should continue to go into work. Nannies, cleaners or tradespeople are permitted to continue going to work (including attending other private homes to do so).	N/a	X Generally, if the employee cannot work from home and chooses not to come to work (unless one of the other categories applies), he/she will not have a right to pay unless they reasonably believe that they are in serious or imminent danger (see blog here for more detail). Employers should carefully consider whether or not to treat any such absence from work as a disciplinary issue, bearing in mind the current pandemic situation, which makes any dismissal arising from such a process less likely to be viewed favourably by a Tribunal.	✓ The furlough scheme has now been extended to March 2021 (although the government has stated it will review the scope of the scheme in January). Subject to an individual satisfying the eligibility requirements, he/she could be furloughed.	✓ If an individual cannot work from home and is not willing/able to return to work (and none of the other categories apply), you could suggest that they use accrued but untaken holiday to cover any period of absence.	✓ If an individual cannot work from home and is not willing/able to return to work (and none of the other categories apply), you could suggest that they take unpaid leave to cover any period of absence.

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Unwell due to COVID-19 Has COVID-19 symptoms and/or positive test result	10 days' self-isolation (or until a negative test result is obtained).	X Not until the end of the self-isolation period or until a negative test result is obtained (provided that the individual is then without symptoms).	✓ The individual should not work from home while unwell. Normal sick pay rules apply. If the individual is feeling better but still required to isolate and can and does work from home, they will be entitled to their usual pay.	✓ Usual contractual and Statutory Sick Pay (SSP) entitlements apply. The waiting period for SSP has been removed for COVID-19 absences, so SSP applies from the first day of absence until the end of the self-isolation period or a negative COVID-19 test.	✓ The furlough scheme is not intended for short-term sick absences. However, individuals who are currently off sick can be furloughed for business reasons. Furloughed employees who become ill, due to COVID-19 or any other cause, must be paid at least SSP. As under the furlough scheme previously, it is up to employers to decide whether to move these employees onto SSP or to keep them on furlough, at their furloughed rate.	X Individuals cannot be required to take holiday during sick leave (although they can choose to). If employees have pre-booked holidays falling during the period of sickness, they must be allowed to re-arrange these if they ask to do so.	X
Self-isolating Lives with someone with COVID-19 symptoms or in a linked or extended household with symptoms	14 days	X Not until the end of the self-isolation period.	✓ If the individual is able to work from home, they will be entitled to their usual pay.	✓ Usual contractual and SSP entitlements apply. The waiting period for SSP has been removed for COVID-19 absences, so SSP applies from the first day of absence until the end of the self-isolation period.	✓ The furlough scheme is not intended for short-term sick absences. However, individuals who are currently off sick can be furloughed for business reasons. Furloughed employees who become ill, due to COVID-19 or any other cause, must be paid at least SSP. As under the furlough scheme previously, it is up to employers to decide whether to move these employees onto SSP or to keep them on furlough, at their furloughed rate.	X Individuals cannot be required to take holiday during sick leave (although they can choose to). If employees have pre-booked holidays falling during the period of sickness, they must be allowed to re-arrange these if they ask to do so.	X

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Self-isolating In accordance with a notification from NHS Test and Trace	14 days	✗ Not until the end of the self-isolation period.	✓ If the individual is able to (and does) work from home, they will be entitled to their usual pay.	✓ Usual contractual and SSP entitlements apply. The waiting period for SSP has been removed for COVID-19 absences, so SSP applies from the first day of absence until the end of the self-isolation period.	✓ The furlough scheme is not intended for short-term sick absences. However, individuals who are currently off sick can be furloughed for business reasons. Furloughed employees who become ill, due to COVID-19 or any other cause, must be paid at least SSP. As under the furlough scheme previously, it is up to employers to decide whether to move these employees onto SSP or to keep them on furlough, at their furloughed rate.	✗ Individuals cannot be required to take holiday during sick leave (although they can choose to). If employees have pre-booked holidays falling during the period of sickness, they must be allowed to re-arrange these.	✗
Self-isolating Compulsory 14 day isolation after returning to the UK from abroad	14 days	✗ Not until the end of the 14 day isolation period.	✓ If the individual is able to (and does) work from home, they will be entitled to their usual pay.	Maybe. If the individual is sick, they will be entitled to the usual contractual/ SSP entitlements. If the individual is not sick but cannot work from home, they will not generally be entitled to pay. However, this will depend and there may be circumstances in which employers exercise their discretion to pay in any event, e.g. if the travel was work-related, so as to offset any risk of grievance/constructive dismissal claim.	✓ The furlough scheme is not intended for short-term sick absences. However, individuals who are currently off sick can be furloughed for business reasons. Furloughed employees who become ill, due to COVID-19 or any other cause, must be paid at least SSP. As under the furlough scheme previously, it is up to employers to decide whether to move these employees onto SSP or to keep them on furlough, at their furloughed rate.	✓ If the employee is not entitled to be paid and there are no circumstances that might persuade the employer to pay anyway, this option should be discussed with the employee. The employer can choose to compel the taking of some holiday by giving advance notice under the Working Time Regulations.	✓ If the employee is not entitled to be paid and there are no circumstances that might persuade the employer to pay anyway, this option should be discussed with the employee. It cannot be imposed without constructive dismissal or unlawful deductions risk.

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<p>Shielding</p> <p>The shielding programme had been paused as of 1 August, but the clinically extremely vulnerable have been asked to commence shielding again from 5 November. People who live with those who are clinically extremely vulnerable, but not clinically extremely vulnerable themselves can still attend work if they cannot work from home, in line with the wider rules set out in the new national restrictions from 5 November.</p>	<p>The new shielding measures will apply nationally for four weeks up to 2 December.</p> <p>At the end of the period, the government has suggested it will return to a regional approach and will issue further guidance at the time.</p>	<p>✗</p> <p>Not before 2 December.</p>	<p>✓</p> <p>If the individual is able to (and does) work from home, they will be entitled to their usual pay.</p>	<p>✓</p> <p>Usual contractual and SSP entitlements apply. The waiting period for SSP has been removed for COVID-19 absences, so SSP applies from the first day of absence until the end of the eligibility period.</p>	<p>✓</p> <p>Employers can furlough employees who are shielding or on long-term sick leave. It is up to employers to decide whether to furlough these employees.</p>	<p>✓</p> <p>Potentially, if furlough is not an option.</p>	<p>✓</p> <p>Potentially, if furlough is not an option.</p>

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Vulnerable <ul style="list-style-type: none"> • Aged 70 or older (regardless of medical conditions) • Under 70 with an underlying health condition • Pregnant 	Should be extra careful with social distancing.	✓ Individuals should work from home unless it is not “reasonably possible” to do so. Given the potential risks, however, we recommend that employers take “extra” (as per the guidance) care in relation to the vulnerable and only require them to physically attend work if there are no alternatives. The previous version of the guidance suggested that if the vulnerable were required to come into work, they should be given the safest onsite roles enabling them to maintain social distancing guidelines (2 metres, or 1 metre with risk mitigation, where 2 metres is not viable). This is no longer included within the guidance but would seem a prudent step.	✓ If the individual is able to (and does) work from home, they will be entitled to their usual pay.	✗ Not entitled to SSP.	✗ Not simply by virtue of being vulnerable, only if their role would otherwise be furloughed.	✓	✓

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Childcare responsibilities	Schools, nurseries and other childcare settings are currently expected to remain open throughout the lockdown period until 2 December.	<p>Maybe.</p> <p>The answer to this will depend upon whether it is “reasonably possible” for the individual to work from home, or not. If it is reasonably possible, the individual should be permitted to work from home.</p> <p>See above for “Reasonably possible” to work from home and Not “reasonably possible” to work from home.</p>	<p>✓</p> <p>If the individual is able to (and does) work from home, they will be entitled to their usual pay.</p>	<p>✗</p> <p>The individual would not be entitled to be paid if they were not able to work from home. Best practice here would be to seek to furlough the individual, subject to satisfying the eligibility requirements.</p>	<p>✓</p> <p>Although schools, nurseries and other childcare settings currently remain open, the extended furlough scheme provides that those employees who are unable to work due to childcare responsibilities can continue to be furloughed, subject to satisfying the other eligibility requirements.</p>	<p>✓</p>	<p>✓</p>
Scared of physically going into work For employees not caught by one of the other categories above, e.g. not extremely clinically vulnerable or vulnerable	N/a	<p>Maybe.</p> <p>The answer to this will depend upon whether it is “reasonably possible” for the individual to work from home, or not. If it is reasonably possible, the individual should be permitted to work from home.</p> <p>If not, the employer can require the individual to attend work physically, but please see the other comments in this section relating to their pay entitlements if they do not come into work.</p> <p>See above for “Reasonably possible” to work from home and Not “reasonably possible” to work from home.</p>	<p>✓</p> <p>Working from home should be offered where possible. The individual will be entitled to their usual pay.</p>	<p>Maybe.</p> <p>If it is not “reasonably possible” for the employee to work from home and they refuse to physically come to work, generally the employee will not have a right to pay unless they reasonably believe they are in serious or imminent danger (see blog here for more detail).</p> <p>May be entitled to usual sick pay entitlements if the employee is signed off due to anxiety, i.e. is actually unwell.</p>	<p>✓</p> <p>Subject to satisfying the eligibility requirements, potentially yes.</p>	<p>✓</p>	<p>✓</p>